128

LITIGATION.

1. His Excellency the Governor General in Council desires that there may be no misunderstanding as to the views and wishes of the Government of India with respect to litigation in which the Government is concerned. In many parts of India the union of judicial with executive functions in one chief officer of a district is still, and may long be, inevitable; and His Excellency in Council trusts that all officers, who exercise this double power, realize the responsibility which it throws upon them for scrupulous observance of equity in all suits to which the Government which they serve is a party. To lean towards technical pleas in favour of Government, or towards technical obstacles against a suit which the Government defends, whenever such pleas or obstacles merely hinder a decision on the merits—to strain laws for the advantage of Government—all these things would be exactly contrary to the rule of judicial conduct which in such cases the Government desires to impose. And His Excellency in Council expects all officers to understand that the interests of Government are most effectually promoted by sedulously upholding this high standard of entire impartiality. (G. I., H. D., No. 832, dated 14th May 1873; *vide* G. R. No. 963, dated 21st February 1874.)

2. The reports of the Remembrancer of Legal Affairs in the matter of suits should be treated by the local officers to whom they are sent as strictly confidential documents. (G. R. No. 5120, dated 8th September 1875; *vide* also No. 69 of the rules for the institution and defence of suits.)

3. It should be clearly understood that all opinions and advice given by the Law Officers of Government for the conduct of the law business of Government are to be considered strictly confidential. (G. R. No. 1560, dated 27th March 1878.)

4. When expenditure is incurred for law charges, the sanction of Government should always be communicated to the Accountant General, who should exercise the same supervision over these charges as he does over all other charges. (G. R. No. 3244, dated 1st June 1876.)

5. In applications to Government for sanction to appeal, the date within which the appeal can be preferred should be invariably stated. (G. R., J. D., No. 4834, dated 7th August 1877; *vide* G. M. No. 4923, dated 13th idem.)

6. Government pleaders are not entitled to separate fees for such trivial miscellaneous duties as that of obtaining copies of papers for any Government officer or of searching for original papers. (G. R. No. 4985, dated 15th August 1877.)

7. In an appeal made to a District Court by a private individual, a question arose as to the suffi-

ciency of the court-fee on the memorandum of appeal, and as Government are interested in matters of stamp-revenue, the District Judge gave the Collector an opportunity of being heard, if he should wish, through the District Government Pleader. The Collector thereupon directed the Government Pleader to appear, and the question was disposed of by the Court against the appellant. But in the opinion of the Governor in Council it is unnecessary to direct the Government Pleaders to appear on behalf of Government in such cases. (G. R. No. 5395, dated 5th July 1884.)

8. The Oriental Translator to Government is authorized, when he receives a vernacular paper for translation which turns out to be a notice to Government under Section 424 of the Civil Procedure Code, to return it to the Secretariat at once without a translation, with a view to its being sent without delay, under No. 7 of the Rules relating to the defence of suits, to the proper officer, who will be able to ascertain in his own office what the notice relates to, and will make a report to Government only if there is occasion. (G. R. No. 1912, dated 13th April 1880.)

9. The following extract from a letter from the Remembrancer of Legal Affairs, No. 1460, dated 11th November 1885, was circulated to all Collectors for information and guidance :—

"I take the opportunity of respectfully suggesting that the attention of Collectors should be drawn to No. 8 of the Rules for the defence of suits against Government with regard to notices under Section 424 of the Civil Procedure Code. The object of the notice is to give every opportunity of full justice being done to a complainant before a suit is actually filed. Here the vague opinion of the district Government Pleader on the question of limitation, without any reference to any specific provision of the Limitation Act (an opinion which he afterwards qualified), was not sufficient ground for ignoring the notice. If a reference had been made on receipt of the notice, it is possible that the claim would have been compromised at once, and thus the costs of the suit would have been saved. This is not the first instance in which I have been led to the opinion that it would have been safer had a reference been made by the Revenue authorities on a law point before the filing of a suit."

(G. R. No. 9369, dated 21st November 1885.)

10. The High Court, Bombay, has held that sending a newspaper containing notice amongst other matters is not such a notice as is required by Act X of 1877, Section 424. (High Court's Printed Judgments for 1881, p. 286.) (G. R. No. 962, dated 5th February 1886.)

11. It is not generally desirable that Collectors should accept as sufficient, for the purposes of the Civil Procedure Code, notices published in newspapers. (L. R. No. 809, dated 6th May 1892; *vide* G. R. No. 4803, dated 8th June 1892.)

12. No. 66 of the Rules relating to the conduct of civil suits is of general applicability, and the

name of Government or of any Government officer ought not to be used in any civil proceeding without a reference being first of all made under it, whether the costs of the proceeding will eventually fall on Government or not. (L. R. No. 488, dated 20th April 1880; *vide* G. R. No. 2225, dated 27th idem.)

13. The rules regarding the conduct of suits should be understood as applicable to the Panch Mahâls so far as the peculiar circumstances of that district will admit, and irrecoverable balances on account of pauper costs should not be written off without the previous sanction of Government. (G. R. No. 6980, dated 19th September 1883.)

14. The Collectors of the Kánarese Districts should be instructed that Kánarese documents of importance, which may be sent to the Remembrancer of Legal Affairs with reports on suits, should always be accompanied by their English translations. (G. R. No. 2702, dated 10th April 1889; *vide* also No. 72 of the Rules for the institution and defence of suits.)

15. It is absolutely necessary in all cases in which reports on suits are forwarded to the Remembrancer of Legal Affairs for submission to Government, to state the date of the filing of the plaint, such information being indispensable for the consideration of questions of limitation and other points not perhaps obvious to the officer reporting. (G. R. No. 5373, dated 27th July 1889.)

16. The Commissioners of Divisions and Collectors should see that there is no avoidable delay in reporting on suits filed against Government or Government officers in their official capacity. (G. R. No. 5913, dated 14th August 1889.)

17. Officers reporting on suits requiring Government sanction for their defence, should furnish the Remembrancer of Legal Affairs with English translations of all vernacular documents essential to the merits of the case. (G. R. No. 1883, dated 12th March 1890.)

18. The following extract paragraph 5 of the Legal Remembrancer's report No. 96, dated 22nd January 1891, was forwarded to all heads of offices under the Revenue Department for information and guidance :—

"5. I would ask that Government might be pleased to issue orders that officers in reporting on suits should invariably state the date on which the plaint was filed in Court. In this instance the date was not given, and no mention was made of the point of limitation in the defence proposed. Accordingly, in submitting my report for sanction of the defence, I assumed that the point could not be raised, but if the date of the filing of a suit is not stated, either delay will be entailed in obtaining further information from the officer concerned, or an important point of defence will be liable to escape notice."

(G. M. No. 814-A, dated 30th January 1891.)

19. Whenever it is proposed to take the objection that a plaintiff has not exhausted his rights of appeal, the whole of the proceedings should be furnished with necessary translations to enable the Remembrancer of Legal Affairs to advise whether any right of appeal remained unexhausted. (G. R. No. 1840, dated 11th March 1891.)

20. With a view to avoiding the vexation and expense of unnecessary litigation, the officers concerned should, in forwarding reports on cases where dispute as to the title to land is concerned, invariably send a plan or map of the land in dispute and its surroundings. (G. R. No. 10140, dated 28th December 1892.)

21. The following opinion No. 694, dated 19th October 1875, was recorded by the Remembrancer of Legal Affairs:—

"With reference to Government Resolution No. 5808, dated 14th instant, I have the honour to report that the case put by the Magistrate of Thána is as follows:—

The Magistrate of a District having on appeal reduced the amount of a fine inflicted by a Subordinate Magistrate on a person convicted by him of an offence, directed the excess to be returned to the accused. But a judgment-creditor of the accused caused the Subordinate Magistrate to be served with a notice from a Civil Court for the attachment of the excess before the Subordinate Magistrate had time to issue the necessary order to the Treasury Officer for the payment of it to the accused person.

The Magistrate asks:

(1) Can the Civil Court's order take effect?

(2) Should the Subordinate Magistrate obey the Civil Court's order in preference to the District Magistrate's?

(3) Should the order of attachment not be served on the debtor himself instead of on the Subordinate Magistrate or the Mámlatdár (Treasury Officer)?

"2. The Magistrate seems to regard the Subordinate Magistrate's order as illegal so far as it imposed a fine in excess of that which subsequently, on appeal, the District Magistrate considered to be sufficient, and, therefore, to hold the view that the detention of the excess amount by the Subordinate Magistrate, or by the Treasury Officer, was *ab initio* illegal, and that the money must be considered to have been all along in the accused's possession. But the determination of the amount of fine that should be inflicted upon a person convicted of an offence is a matter of legal discretion. If the Subordinate Magistrate did not exceed the lawful limits of his powers, his sentence was perfectly legal, although perhaps he failed to exercise sound discretion in passing so severe a one. I do not think, therefore, that the question of the legality of the Subordinate Magistrate's sentence can affect the questions which the District Magistrate raises as to the attachment of the excess money.

"3. I am of opinion that the Magistrate's first two questions should be answered in the affirmative, and with regard to the third, that the proper course for attaching the money was for the Civil Court to issue a notice under Section 237 of the Civil Procedure Code to the Subordinate Magistrate or to the Treasury Officer. The money became the property of the accused person as soon as the District Magistrate's order was passed for its repayment to him and so long as it remained in the hands of the Subordinate Magistrate or, subject to his orders for its disposal, in the

hands of the Treasury Officer, it was liable, I think, to be attached like any other money held in trust.

(G. R. No. 6156, dated 1st November 1875.)

22. The following decision of the High Court of Bombay (Judgment in Miscellaneous Special Appeal No. 7 of 1877) laying down that Article 167* of Schedule II, Act IX of 1871, does apply to applications made on behalf of Government under Section 309† of the (old) Civil Procedure Code for the recovery of pauper costs, and that a previous application for execution of the decree made by the actual plaintiff in the suit does not give Government a fresh starting point from which to calculate the period of limitation, was circulated to all officers concerned in order that care might be taken not to allow applications for pauper costs to be neglected until they are time-barred :—

* Cf. Article 179 of Schedule II, Act XV of 1877.

† Cf. Section 411 of the Civil Procedure Code, 1882.

"Section 309 of the Civil Procedure Code of 1859 directs that 'on the decision of the suit, the Court shall calculate the amount of stamps which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, and such amount shall be recoverable by Government from any party ordered by the decree to pay the same in the same manner as costs of suit are recoverable.' In this case the original decree of the Subordinate Judge containing an order directing the payment of the court-fees by the pauper plaintiff was made on the 15th April 1868, and was finally affirmed in this Court on the 28th July 1869. The present application to the Collector to enforce the payment of those fees was made on the 25th November 1875, so that upwards of three years have elapsed since the date of the affirmance of the decree which contained the order for the payment of the fees. The District Judge, while holding that Article 167 of Schedule II of Act IX of 1871 prescribes the period of limitation which is applicable to such a case, yet is of opinion that an application by a defendant, made within three years before the 25th November 1871, for execution in respect of the costs of suit decreed to him, is the terminus whence the period of limitation (three years) should begin to run. We, however, think that the application to enforce or keep in force the decree or order mentioned in the 4th clause of Article 167, which gives a fresh starting point, is an application by the party himself seeking execution or by a party in the same interest as he who presently seeks the enforcement of the decree, and not an application by a party whose interest under the decree is totally unconnected with that of the person seeking present enforcement. The interest of the defendant Apaji Govind in the costs awarded to him by the decree is not in anywise connected with that of the Collector on behalf of Government in the court-fees which the pauper plaintiff has been directed by the same decree to pay. The activity of that defendant was not exhibited in the remotest manner on behalf of Government, but solely on behalf of himself. In the cases in 8 Calc. W. R. 100 Civ. Rul. and 1 Beng. L. R. 62 App. Side, the early and later applicants appear to have been either jointly interested or in the same interest, and so also in the case in 9 Calc. W. R, 485, so far as we can understand the meagre report of it. We think that the right of Government to recover court-fees under Section 309 is subject to the same period of limitation as the right of a subject to enforce a decree or order would be. The Legislature in passing the Limitation Act of 1871, which is applicable to this case, where it intends that Government should have a longer period than the subject, has been careful expressly to say so: as for instance, in Article 150 of Schedule II, where the period

assigned to suits brought by the Secretary of State is sixty years from the time of the accrual of the cause of action; but the Legislature makes no difference between Government and its subjects in the cases of appeals or application (*a*). We fully recognize the authority of *Ganpat Pataya* v. *The Collector of Kánara* (Ind. L. R., I Bombay 7), but that case relates to priority of execution, and has no bearing upon the present question of limitation. Holding, as we do, that the present application of the Collector is barred by Article 167 of Schedule II of Act IX of 1871, we must reverse the orders of both of the Courts below and reject the application with costs throughout.

(*a*) As to the distinction made in the Act (IX of 1871) between suits, appeals and applications, see *Govind Laxuman* v. *Narayan Moreshwar*, II. Bom. H. C. Rep., III.

"We are aware of the explanations annexed to Article 179 of the new Limitation Act (XV of 1877), which article is the enactment therein analogous to Article 167 of the Act 1871, but we have arrived at our decision quite independently of any aid from that quarter."

(G. R. No. 7519, dated 20th December 1877.)

23. The following opinion No. 1060, dated 10th August 1893, was recorded by the Remembrancer of Legal Affairs:—

"The Collector of Surat, who is supported by the Commissioner, N. D., recommends an appeal from the order passed by the First Class Subordinate Judge, Surat, on the application noted in the margin.

In the Court of the First Class Subordinate Judge, Surat.

Darkhást No. 113 of 1893 in Miscellaneous Pauper Application No. 78 of 1888.

Ranchod Morár... ... ... Applicant.

v.

Bejanji Edalji ... ... Opponent.

"2. The facts are as follows:—

(*a*) Ranchod Morár applied for leave to sue as a pauper.

(*b*) The application was opposed by the District Government Pleader on notice given under Section 408 of the Code of Civil Procedure, as well as by the opposite party against whom the suit was to be brought.

(*c*) On the hearing of this application the Court, at the instance of all the opponents, required the applicant to give security for opponents' costs, and one Vaumálidás Dayárám passed a surety bond accordingly on 19th September 1889.

(*d*) On 29th November 1889 the Court passed the following order:—

'Since the applicant does not wish to proceed with his application, I reject his application to be allowed to sue *in formâ pauperis*, and order him to pay the costs of the opponents and bear his own.'

(*e*) The decree, originally silent as to the persons to whom costs should be paid, having been so amended under Section 206 of the Code of Civil Procedure as to bring it into conformity with the order, an application (Darkhást No. 113 of 1893) was made to recover the costs incurred by Government in opposing the application for leave to sue as a pauper.

(*f*) This application was rejected for reasons fully stated by the Subordinate Judge whose order dated 26th July 1893 is among the papers.

(*g*) The principal grounds given for the rejection of the order are:—

(i) that the surety bond was taken under Section 380 of the Code of Civil Procedure, and that it is doubtful whether such a bond could be taken before the petition had been numbered and registered as a suit,

(ii) that neither the Collector nor the Government Pleader was a defendant,

(iii) that the surety bond, though accepting liability for the costs of the opponents, does not specify who the opponents are.

"3. Against this order it is now proposed to appeal.

"4. The case at I. L. R., VI Bom., 590, shows that no appeal would be admissible in such a case under Section 244 (*c*) of the Code of Civil Procedure, as the Collector is no party to the *suit*, while it seems equally clear from the decision at I. L. R., XV Bom., 77, that an appeal might be entertained under Section 622.

"5. I consider, however, that an appeal from the order passed would most certainly fail.

"6. The surety bond purports to have been taken because the applicant resides out of British India and possesses no property within British India. *'For this reason,'* it states, 'the Court has required the applicant to give security for the opponents' costs.'

"7. Now it is clear from Section 380 of the Code of Civil Procedure that a surety bond may be taken for such reason *'at the institution or at any subsequent stage of a suit.'*

"8. But it is also clear—

(*a*) that an application to sue as a pauper until it has been granted, does not amount to *'the institution of a suit,'*

Section 480, Code of Civil Procedure, and *vide* also I. L. R., 10 Bom., 207.

(*b*) that there is no authority under Chapter XXVI to take such a bond in an enquiry into the pauperism of an applicant under that chapter, and

(*c*) lastly, that the Legislature contemplated as a distinct question the recovery of costs incurred by Government in resisting such application.

Thus—

(*a*) if adjudication follows

(i) when plaintiff succeeds, Section 411 applies;

(ii) when plaintiff fails, Section 412 applies;

(*b*) if an order or refusal is made under Section 409 and the application is rejected, Section 413 applies, from which it will be seen that

(i) if the applicant drops the suit, the Code is *absolutely* silent as to costs, presumably on the ground that the applicant was really too poor to carry it on, while

(ii) if the applicant chooses to sue in the ordinary manner he is at liberty to institute a suit, *provided that he first pays* the costs, if any, incurred by Government in opposing his application for leave to sue as a pauper.

"9. The remedy, if any, in this case lies therefore, I think, *not* against the surety, but under Section 413 of the Code of Civil Procedure, in case the applicant, whose application has been rejected, brings a suit in the ordinary manner, and in that event the District Government Pleader should move the Court to require him before the suit is entertained to pay the costs incurred by Government in opposing his application for leave to sue as a pauper.

"10. I would beg to recommend that the District Government Pleader be instructed accordingly.

* * * * * *

"12. I doubt whether the remedies I have indicated above in case of pauper costs are generally understood, and Government might perhaps deem it desirable, if they concur in my view, to have this opinion circulated so as to avoid mistakes and facilitate recovery in cases of this nature, in which, as

Government are probably aware, attempts at recovery are so commonly infructuous."

* * * * *

(G. R. No. 6319, dated 31st August 1893.)

24. It is a frequent practice and often a necessary one for the Collector to agree with judgment-debtors (whether the judgment-debt be on account of pauper costs or under an ordinary decree) to allow them to pay what is due by them to Government gradually in fixed instalments. Such agreements must, under Section 275A of the Civil Procedure Code, in every case be made with the sanction of the Court which passed the decree; otherwise they are void. When payments are made in accordance with such agreements out of Court, the debtors are entitled, under Section 258 of the Civil Procedure Code, to have those payments certified to the Court. If default is made in any payment, execution of the decree should be applied for in the usual course, the agreement being regarded as a modification and *not* as a supersession of the decree. A separate suit will not lie upon the agreement. (L. R. No. 162, dated 4th February 1892; *vide* G. R. No. 1110, dated 13th idem.)

25. As regards *all* appeals to Her Majesty in Council in which Government are interested, the Secretary of State should in each case be furnished with a distinct expression of the opinion of the Government transmitting the papers as to the course which ought to be adopted by him. It not unfrequently happens that the papers reach the India Office unaccompanied by any clear indication of the steps which it is desired the Secretary of State should take, and it is necessary that he should always receive such an indication for his assistance in arriving at a decision in the matter.

These instructions should be strictly observed in cases to which Government or the Court of Wards are a party. When an appeal, to which a Municipality is a party, is preferred to the Privy Council, the duty of making arrangements for the conduct of the case must be undertaken by the Municipality concerned; and the information and papers required by the* letter from the Government of India in the Home Department, No. 1-119, dated 30th January 1878, should be forwarded to the India Office only in cases to which the Government or the Court of Wards are a party. (G. I., H. D., No. 1274, dated 9th September 1889; *vide* G. R. No. 8067, dated 23rd October 1889.)

26. The Accountant General should, in consultation with the Legal Remembrancer and the

* 'With reference to the action to be taken in this country and the instructions to be given to Counsel, it is important that this office should be made acquainted with the views of the different Governments from whose Courts appeals may be brought either by or against the Crown, and with the opinions of their local advisers; and even as regards the mere procedure of the Appellate Court, it is to be observed that the absence of information as to the transmission of the record places the Government

Solicitor to Government, furnish an annual statement of the recoveries effected in this Presidency in respect of costs in Privy Council appeal cases for transmission to the Government of India at the end of each calendar year. The statement should be sent in time for transmission to that Government not later than 1st February. (G. R. No. 231, dated 28th January 1881.)

27. The only powers which exist of issuing a Commission in a criminal case are those contained in Chapter 40 of the Code of Criminal Procedure, and those powers do not include that of issuing a commission to England for the examination of witnesses there. (Adv. Genl., No. 106, dated 18th October 1892; *vide* G. R. No. 8370, dated 25th idem.)

---

at a disadvantage, and might lead to the dismissal of one of its appeals for want of prosecution, or to a decision *ex-parte* against the Government as respondent.

* * * * *

"I request further that in all appeals, to which the Government is a party, from provinces under the administration of your Government, the fact of the transmission of the appeal should e communicated to this office, with such information regarding it as you consider desirable, in order that proper steps may be taken for protecting the public interests."

Paragraphs 7 and 10 of the Secretary of State's Despatch No. 49, Judicial, dated 13th December 1877, to the Government of India; *vide* G. I., H. D., No. 1-119, dated 30th January 1878. (G. R. No. 919, dated 11th February 1878.)